United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL WITH PROOF OF SERVICE

75-7699

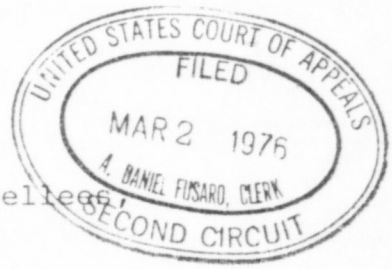
75-7646

UNITED STATES COURT OF APPEALS

76-7011

for the

SECOND CIRCUIT



GEORGE RIOS, et al,

Plaintiffs-Appellees,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U. A., et al,

Defendants-Appellants.

- -

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

-against-

ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U. A., et al,

Defendants-Appellants.

ON APPEAL FROM UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT ENTERPRISE ASSOCIATION STEAMFITTERS LOCAL 638 OF U. A.

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/

STATEMENT OF ISSUES

I. WHETHER THE DISTRICT COURT'S AWARD OF ATTORNEYS' FEES TO THE NATIONAL EMPLOYMENT LAW PROJECT, WHICH IS FUNDED BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND THE OFFICE OF ECONOMIC OPPORTUNITY, IS PROHIBITED BY SECTION 706(k) OF THE CIVIL RIGHTS ACT AND/OR CONSTITUTES AN ABUSE OF DISCRETION UNDER THE CIRCUMSTANCES OF THIS CASE.

II. WHETHER THE DISTRICT COURT ERRED IN AWARDING CERTAIN COSTS AND DISBURSEMENTS TO THE NATIONAL EMPLOYMENT LAW PROJECT.

PRELIMINARY STATEMENT

Appellant, Enterprise Association Steamfitters Local Union 638 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (hereinafter referred to as the "Union"), appealed from the Order of the Honorable Dudley B. Bonsal, United States District Judge, Southern District of New York, signed on October 9, 1975 and entered on October 17, 1975 (hereinafter referred to as the "Order"), awarding $50,000 in attorneys' fees, and costs and disbursements, to the National Employment Law Project, counsel for plaintiffs in 71 Civ. 847.

Pursuant to the terms of the Order, the fees are to be paid for by the Union alone.

The Order appealed from is set out in the Appendix at page 1033 (hereinafter citations to the Appendix will be designated as "A-____"). The District Court's Memorandum in which the District Court's rationale for awarding fees is set forth, is at A-1011 and is reported at 400 F.Supp. 993 (June 27, 1975).

The first installment of the fees is not payable under the terms of the Order, as interpreted by the District Court's denial of plaintiffs' motion to amend or alter the order, until April 17, 1976; the District Court expressly provided that a "further stay, if any, should be sought in the Court of Appeals." A-1033, 1034. Such a stay has been granted by this Court, pending the outcome of the appeal. Order of this Court, February 10, 1976. It is essential that the Union know whether the Project will be entitled to receive fees prior to what may be protracted back pay litigation in the District Court (which is already the subject of other appeals to this Court).

The procedural background of this case has been fully set forth by the District Court opinion in United States v. Enterprise Association Steamfitters Local 638, 360 F.Supp. 979 (S.D.N.Y. 1973) (main decision on merits) and i this Court's opinion in Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974) (affirming the Order imposing affirmative relief and remanding for recalculation of goal; Judge Hays dissented). This case is

succinctly summarized by this Court's second decision in this case, in which intervention by whites was denied. Rios v. Enterprise Association Steamfitters Local 638, 520 F.2d 352 (2d Cir. 1975). This Court described the case as follows:

> "The history of this action goes back at least four years. In 1971 the federal government and private plaintiffs brought suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq., alleging a pattern and practice of illegal discrimination by the Enterprise Association Steamfitters, Local 638 ('Union' herein) against non-whites. Lengthy pretrial proceedings and a full non-jury trial on the merits before Judge Bonsal resulted in a finding of illegal discrimination and an order prohibiting certain racially discriminatory practices and mandating affirmative action to increase non-white membership in the Union. United States v. Enterprise Association Steamfitters, Local 638, 360 F.Supp 979 (S.D.N.Y. 1973). The district court's findings of fact and conclusions of law were affirmed by us and the case remanded for recalculation of the percentage goal for non-white membership in the Union, which had been fixed at 30%. Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974)." 520 F.2d 352, 353-354.

In addition, the District Court has reduced the percentage goal pursuant to this Court's remand (400 F.Supp. 983 (1975)), has awarded attorneys fees (400 F.Supp. 993 (1975)) and has rendered a decision as to back pay (400 F.Supp. 988 (1975)).

The District Court decision on attorneys' fees also summarizes the proceedings, and clarifies the separate origins and present identity of the Rios and E.E.O.C. actions as follows:

"Rios v. Enterprise Association Steamfitters, Local 638 of U.A., 400 F.Supp. 983, was instituted on February 26, 1971 as a class action wherein four non-white workers alleged violations by defendants of Title VII of the Civil Rights Act of 1964, as amended. United States v. Enterprise Association Steamfitters, Local 638 of U.A., 71 Civ. 2877 (hereinafter referred to as the 'government action') was filed by the Attorney General on June 29, 1971, pursuant to his authority under Title VII, 42 U.S.C. §2000e-6(a). The Equal Employment Opportunity Commission ('EEOC') was substituted as plaintiff in the government action on April 16, 1974 pursuant to F.R.Civ.P. 25. These actions were consolidated for the purposes of trial and tried before this Court. The prior proceedings are reported at Rios v. Enterprise Association Steamfitters Local 639 [sic] of U.A., 400 F.Supp. 983 (S.D.N.Y. 1975); United States v. Local 638, Enterprise Association of Steam, etc., 360 F.Supp. 979 (S.D.N.Y. 1973), aff'd but remanded in part, 501 F.2d 622 (2d Cir. 1974); United States v. Local 638, etc., 337 F.Supp. 217 (S.D.N.Y. 1972); Rios v. Enterprise Association Steamfitters Local Union No. 638 of U.A., 326 F.Supp. 198 (S.D.N.Y. 1971); Rios v. Enterprise Association Steamfitters Local Union #638 of U.A., 54 F.R.D. 234 (S.D.N.Y. 1971).

"The Rios plaintiffs move for attorneys' fees of $128,092.50 for their attorneys the National Employment Law Project (hereinafter the 'Project'), for $2,043.15 in disbursements and for $3,601.49 in costs. The EEOC moves for $6,014.45 in costs incurred in pursuing its action. Defendants oppose these motions." 400 F.Supp. at 994-995.

STATEMENT OF FACTS

The Union has been opposed by two sets of attorneys in this case: the United States Attorney's Office representing the United States and later the Equal Employment Opportunity Commission (hereinafter referred to as the "EEOC") in 71 Civ.

2877, and the National Employment Law Project (hereinafter referred to as the "Project") representing a class of black and Spanish surnamed individuals in 71 Civ. 847.[1]

The litigation, after consolidation for purposes of trial, proceeded as one case. Th United States Attorney's Office has not sought fees while the Project has.

The District Court described the Project as follows:

> "The Project states that it is a 'law office funded through the Council of New York Law Associates' Charitable Trust...pursuant [primarily] to grants from the United States Office of Economic Opportunity ('OEO') and [in small part] from Trinity Church in the City of New York for the purposes of providing assistance in the area of employment law to legal services attorneys and of representing the poor in connection with employment-related legal problems.' In addition, the Project receives a significant portion of its funds, pursuant to contracts with the EEOC." 400 F.Supp. at 995.

Indeed, the Project has admitted that between 92% and 97% of its funding comes from E.E.O.C. and O.E.O. February 21, 1974 Letter from Dennis Yeager (hereinafter referred to as "Letter"), A-760.

---

[1]Mr. Yeager, formerly an attorney with the Project, is now listed as co-counsel; no fees have been sought by or granted to Mr. Yeager's firm to date; it is thus premature to raise a question of whether such fees would be proper.

The District Court reviewed the Project's efforts before and after trial, and noted that while the full amount of $128,092.50 would have been allowed under different circumstances, in view of the fact that only the financially weak Union was found liable to pay the fees, the amount would be reduced to $50,000. Costs and disbursements were allowed to the Project in the full amounts of $3,601.49 and $2,043.15 respectively, and in addition an award of costs was made to the United States Attorney's Office in the amount of $6,014.45. Both amounts are payable by the Union only. 400 F.Supp. 993, 997-998.

The District Court observed that:

> "In determining the amount of attorneys' fees to be awarded, however, the circumstances of the case and the nature and roles of the parties must be considered. Local 638 is not a profit-making organization able to pass the expense of attorneys' fees on to its customers. It is an association of steamfitters united for their mutual employment protection and is supported only by dues and other assessments collected from its members. There was no proof at trial that the members of Local 638 individually engaged in discriminatory practices against members of the plaintiff class, but it is the members who will bear the burden of payment of an attorneys' fee award taxed against Local 638." 400 F. Supp. at 996.

We submit that the circumstances and factors alluded to by the District Court warranted denial of any fees.

POINT I

ATTORNEY FEES SHOULD NOT HAVE BEEN AWARDED TO THE NATIONAL EMPLOYMENT LAW PROJECT BECAUSE SECTION 706(k) OF THE ACT BARS THE AWARDING OF FEES TO "THE COMMISSION OR THE UNITED STATES"; IF AN AWARD OF FEES WAS PERMISSIBLE IN THIS CASE, THEN THE DISTRICT COURT ABUSED ITS DISCRETION IN SO DOING BECAUSE THE PURPOSES OF THE ACT WOULD NOT BE SERVED BY AN AWARD OF FEES TO THE PUBLICLY FUNDED NATIONAL EMPLOYMENT LAW PROJECT. THE FEES AWARDED ARE EXCESSIVE IN LIGHT OF THE DUPLICATION OF EFFORTS BY THE TWO PLAINTIFFS, THE FACT THAT THE PROJECT IS PUBLICLY FUNDED, AND THE HARDSHIP THAT WOULD BE IMPOSED ON THE UNION TO PAY SUCH AMOUNTS.

A. Section 706(k) of the Act Precludes an Award of Fees to the National Employment Law Project.

Section 706(k) of the Civil Rights Act of 1964, as amended, provides, in part, that:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, ..." 42 U.S.C. §2000e-5(k) (emphasis added).

The National Employment Law Project, attorneys for the Rios plaintiffs, have admitted that between 92% and 97% of the Project's funding comes from governmental sources, namely the United States Office of Economic Opportunity and the United States Equal Employment Opportunity Commission.

Letter, A-760; October 26, 1973 Affidavit of E. Richard Larson, page 2 (hereinafter referred to as "Larson Affidavit"), A-949, 950.

The Act itself states that the United States and the E.E.O.C. are not entitled to fees. 42 U.S.C. §2000e-5(k). Surely the United States through O.E.O. and E.E.O.C. cannot circumvent the statute by funding devices and contracts to the Project. 2A C.J.S. Agency, §§143-144(1972). If the E.E.O.C. is allowed to circumvent the Act in this case, it will be indirectly able to increase its own budget by farming out more and more cases which Congress intended E.E.O.C. itself to litigate. Indeed, taken to its logical extreme, an endorsement by this Court of this situation would enable the United States Attorney's Office to "contract out" its cases to law firms and the Project and permit attorneys employed by law firms or the Project to collect attorneys' fees. Yet although the Project declined to provide copies of its contracts with and grants from E.E.O.C. and O.E.O., and did not furnish details as to the operation of the Project (Letter, page 1, A-760; see also Letter of Yeager to District Court dated April 4, 1975, A-1002; Letter of Yeager to Brook dated April 24, 1975, A-1004; Objections to Union's Interrogatories, A-1021), the District Court held that the Project was not precluded from receiving fees under the Act.

The legislative history of Title VII shows that Congress intended the award of counsel fees to "make it easier for a plaintiff of limited means to bring a meritorious suit". Congressional Record, June 4, 1964, page 12724 [Explanation by Senator Humphrey of changes made in House Bill by Senate]. Cf. Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968) (Title II of Civil Rights Act, 42 U.S.C. §2000a, et seq.); Albemarle Paper Company v. Moody, ____ U.S. ____, 95 S.Ct. 2362, 2370 (1975) (apparently adopting Piggie Park rationale that fees should be awarded absent "special circumstances"). Obviously, this purpose is not served by an award to those who pay no fees and utilize the services of an E.E.O.C. and O.E.O. funded organization. These facts are the type of "special circumstances" which would render an award herein unjust.

Other Courts have in fact denied attorneys fees to this Project. Woolfolk v. Brown, 358 F.Supp. 524 (E.D. Va. 1973); Dublino v. New York Department of Social Services, ____ F.Supp. ____ (W.D.N.Y. 1972) 1971 Civ. 306, Letter, A-760, 765; Sims v. Sheet Metal Workers Local 65, 353 F.Supp. 22 (N.D. Ohio 1972) (fees denied); issue remanded for further consideration, 489 F.2d 1023 (6th Cir. 1973) (The Court of Appeals merely instructed the District Court to consider, not to grant, the request for fees).

The District Court found that there are "obvious distinctions between the EEOC or the 'United States', which are precluded from recovering attorneys' fees under Title VII, and the Project." 400 F.Supp. at 996. However, it is submitted that none of the factors referred to by the District Court overcome the fact that 97% of the Project's funds are from E.E.O.C. and O.E.O. Thus, while the Project attorneys are not "government employees, [and] do not enjoy the protections of the civil service laws or of legislatively mandated salaries", 400 F.Supp. at 996, they are salaried, and almost all of those salaries come from the U.S. Treasury. Further, since they are salaried, their incomes do not depend on fees for cases they take. There is no need to compensate or reward them financially and they have undertaken no personal financial risk in this case. In addition, the salaries of the Project's attorneys, especially if geared to the hourly rates claimed, may well exceed the government pay scale; likewise, Project employees may have even more independence and job security than provided for in civil service rules.

Finally, while the Project has on occasion opposed the government, 400 F.Supp. at 996, n.2, it is not unheard of for government attorneys employed by one Department or

Agency to be on the opposing side of another government agency, see e.g., United States v. Interstate Commerce Commission, 337 U.S. 426 (1949); New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215, 1218 (2d Cir.), cert. denied, 419 U.S. 964 (1974); United States v. United States, 296 F.Supp. 853 (D.D.C. 1968), aff'd 396 U.S. 491 (1970), so that this factor is insignificant.

We respectfully submit that the District Court overlooked the obvious reason for the Congressional refusal to award fees to the U.S. and E.E.O.C., namely, that those entities, like the Project, have as part of their normal professional duty the obligation to undertake Title VII cases, that fees are not necessary to induce them to do so and that litigants can use those agencies without cost.

B. Even if it is Determined that an Award of Fees in this Case was not Barred by the Act, the District Court Abused its Discretion in Making the Award Because the Purpose of Awarding Attorneys' Fees Under Title VII Would not be Promoted by an Award of Fees to Plaintiffs Represented by a Publicly Funded Agency.

Even if this Court determines that the District Court did not err in finding that the Project is not precluded

by statute from obtaining an award of fees, Section 706(k) provides that the District Court "...in its discretion, may allow...reasonable attorneys fees...." 42 U.S.C. §2000e-5(k). See 6 Moore's Federal Practice, ¶54.77. It is submitted that the District Court abused its discretion by awarding fees in this case.

The same District Court which awarded fees here has recognized, in a non-Title VII context, that public policy is not served by awarding counsel fees to a publicly (O.E.O.) funded legal organization. In Gaddis v. Wyman, 336 F.Supp. 1225 (S.D.N.Y. 1972), the District Court stated:

> "The Legal Aid Society of Westchester County, attorneys for plaintiff and plaintiff-intervenors, is an OEO funded organization, and the individual attorneys from the Legal Aid Society who were involved in this action did not expend any of their own private funds. Accordingly, the court, in the exercise of its discretion, denies plaintiffs' application for attorneys' fees. Ojeda, et al. v. Hackney, etc., 452 F.2d 947 (5th Cir. 1972); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1970); Lee v. Southern Home Sites Corp., 429 F.2d 290, 295 (5th Cir. 1970)." 336 F.Supp. at 1227-1228.

The First Circuit's decision of Hoitt v. Vitek, 495 F.2d 219 (1st Cir. 1974), followed the Gaddis rationale and upheld as a proper exercise of the District Court's discretion a decision to award a fee to private counsel, but

not to the O.E.O.-funded New Hampshire Legal Assistance. The First Circuit rationale in Hoitt, supra, is applicable here:

> "The district court, though taking this view, nonetheless denied fees to the NHLA attorneys. Both the private attorney and the NHLA attorneys below undertook the case without anticipation of reimbursement from their clients. Both pursued the case with dedication. The primary distinction between the two is a generic one. The private attorney earns his salary from private clients on a fee-paying basis. The private attorney may either be a salaried associate of a firm a partner sharing the profits, or more directly dependent on the accumulated fees from his client. The NHLA attorney is salaried through the federal Office of Economic Opportunity by an eighty per cent federally-funded project. Undertaking a non-fee paying case is his job and he cannot increase his income by an award of fees to the association." 495 F.2d at 220 (emphasis added).

Accord, Ross v. Goshi, 351 F.Supp. 949, 956 (D. Haw. 1972).

This rationale has also been applied in Title VII litigation. In U.S. v. Local 3, Operating Engineers, ____ F.Supp. ____, 6 F.E.P. Cases 984 (N.D. Cal. 1973), the Court awarded a fee to counsel for certain plaintiffs. However, in considering the factors noted by the Court in awarding the fee, it is apparent that the Project would not have been eligible for such an award. Thus, the Court considered the fee arrangement with the client and risk of financial loss to the attorneys, noting that the counsel requesting fees had advanced the costs of the litigation whereas "costs of

other individual plaintiffs were borne by the publicly funded agencies." 6 F.E.P. Cases at 986. In the instant case the Project had no fee arrangement, no risk of loss and no personal outlays. There should be no award of fees.

Courts have in fact denied attorneys fees to this Project. Thus, in Woolfolk v. Brown, 358 F.Supp. 524 (E.D. Va. 1973) (mentioned upon request in the Letter, A-760), the Court stated:

> "The Gaddis court appears to indicate that a compensatory award is not merited when the legal services expended are already provided for by public funding. That conclusion impliedly makes short shrift of the Neighborhood Legal Aid's argument here that the time utilized in prosecuting the present motions resulted in denial of services in kind to other Legal Aid constituents ....that Legal Aid's determination of how to allot its time -- which is prepaid by its supporters -- is an administrative decision for which an adversary should not be held accountable." 358 F.Supp. at 536.

See also Dublino, supra, and Sims, supra.

As the District Court herein recognized, "the cases appear to be divided as to whether the statutory exception as to awards of attorneys' fees to the E.E.O.C. and the United States applies to public interest attorneys such as the Project...." Rios v. Enterprise Association Steamfitters Local 638, et al., 400 F.Supp. 993, 996 (S.D.N.Y.

1975) (citations omitted). The District Court sought to distinguish contrary authority such as Gaddis and Woolfolk on the authority of Alyeska Pipe Line Co. v. The Wilderness Society, 421 U.S. 240 (1975), by stating that those cases did not involve statutes which provide for attorneys fees. 400 F.Supp. at 996, n.1. However, we submit that Alyeska, supra, does not disturb the underlying rationale of the cases on which the Union relied (and still relies), namely, that an award of fees to the Project is not necessary to encourage litigants of limited means to pursue their rights. Rather, Alyeska, as it applies to this case, merely says that the result reached in the Gaddis line of cases was compelled. Further, Alyeska does not require District Courts to grant fees even where it is permissible to do so under the terms of a statute.

C. Even Assuming that Fees Could Have (Point I(A)) and Should Have (Point I(B)) Been Awarded, the District Court Abused its Discretion by Awarding an Excessive Fee in Light of (1) the Amount of Duplication Between the Project and the United States Attorney's Office, (2) the Lack of Relationship Between Rates Charged and Salaries Paid to the Project Attorneys, and (3) the Hardship that would be Imposed on the Union to Pay Such Amounts.

(1) After Consolidation of 71 Civ. 847 with 71 Civ. 2877, the Efforts of the Project were Parallel to and Largely Duplicative of Those of the Able Assistant United States Attorneys

By virtue of the District Court's Pre-Trial Order of December 26, 1972, 71 Civ. 847 was consolidated for trial with 71 Civ. 2877 and thereafter both cases proceeded as one. See Rios, supra, 400 F.Supp. 993, 994-995. The United States Attorney's Office as well as Project attorneys participated in the trial, submitted briefs and attended conferences before the Court. There was no aspect of this litigation, after consolidation, in which the United States Attorney's Office did not have a major role.

Without in any way denigrating the ability of the Project's attorneys, the fact that the Assistant United States Attorneys in this case were quite able and sought and obtained substantially the same relief (Opinion, 360 F.Supp. 979, 983-984; Transcript, Trial, page 13) should have been taken into account to a greater extent than it was. Cf. City of Detroit v. Grinnell Corporation, 495 F.2d 448 (2d Cir. 1974); Lea v. Cone Mills Corp., 467 F.2d 277 (4th Cir. 1972); U.S. v. Local 3, Operating Engineers, supra, 6 F.E.P. Cases at 987. In this case the United States has already financed 97% of the Project and 100% of the United States Attorney's Office. It is submitted that the Union should

not be required to additionally finance these attorneys.

(2) The Fees Sought Bear no Demonstrated Relation to the Salaries Received by the Project Attorneys and no Fee was Paid to them by Plaintiffs

"All of the Project attorneys who have worked on 71 Civ. 847 are employees of the Project and the Trust (pursuant to the O.E.O. grant) or are employees of the Project (pursuant to the E.E.O.C. contract)." Larson Affidavit, page 2, A-950.

There was no risk involved to the Project or its attorneys in taking this case because they are salaried and do not depend on fees for their income. Moreover, the fees would be used to finance future litigation (Larson Affidavit, page 2) not to recompense the attorneys for their time spent on this case. In addition, it is admitted that none of the clients paid or will pay fees to the Project. Larson Affidavit, page 2, A-950.

While the Project is technically counsel for a party rather than the party itself, it is the Project which will receive any award granted (Order, page 1, A-1033), so that it is relevant and necessary to consider that by the very nature of the Project's relationship with the federal government, the award of fees is made to the E.E.O.C. and

the United States in contravention of the Act, 42 U.S.C. §2000e-5(k).

(3) It Would Impose a Hardship on the Union to Pay Attorneys' Fees

The Union has limited financial resources. It has spent vast amounts of money to implement the provisions of the District Court's Orders, especially the Affirmative Action Plan, to the specific advantage of the plaintiff class. The Union's funds can further Title VII purposes more effectively by implementing these programs than by subsidizing the government funded Project lawyers. See Woolfolk v. Brown, supra, 358 F.Supp. at 537; Chastang v. Flynn and Emrich Company, 381 F.Supp. 1348, 1351 (D. Md. 1974).

For all of the above reasons, this Court should reverse the District Court's award of attorneys fees in this case, or, if the decision below is sustained, this Court should remand the issue with instructions to reduce the fees in light of the above factors.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN DETERMINING THE AMOUNT OF COSTS TO BE AWARDED PLAINTIFFS AT THE UNION'S EXPENSE.

Although the District Court has the discretion to

award costs to the prevailing party, including the government, Federal Rules of Civil Procedure, Rule 54(d); 42 U.S.C. §2000e-5(k); 28 U.S.C. §1920, Rule 54(d) does not give a winning litigant the right to be reimbursed for every expense he has seen fit to incur in the conduct of his case. Farmer v. Arabian American Oil Co., 379 U.S. 227, 235 (1964).

It is respectfully submitted that the District Court abused its discretion by not limiting the amount ($5,644) and scope of costs and disbursements to be awarded to the Project since several of the items requested by the Project were improper, the costs of transcripts requested by both sets of plaintiffs' attorneys were duplicative, and the Union has limited ability to pay such extensive costs in addition to the expenses incurred in implementing the Affirmative Action Plan.

The Project, in the affidavit of Dennis Yeager dated February 1, 1974, A-954, outlines many of the expenses incurred in the conduct of their case which were awarded but not covered by the relevant sections of the Federal Rules, or should have been denied as a matter of discretion:

(a) $1,749.30 for travel, expenses and fees of witnesses;

(b) $225.97 for travel, other than for witnesses;

(c) $67.88 for other expenses; and

(d) $250.00 for subway fares and Xerox costs.

In his letter dated February 21, 1974, A-760, Mr. Yeager itemized the specific expenses incurred as witness fees, expenses and travel, and travel other than for witnesses, ((a) and (b) above), as follows:

Witness fees	
Dr. Barrett	$1,349.00
Witness travel	
Dr. Derryck	100.00
Eric Lewis	300.30
Yeager travel expenses to attend post-trial conference of 6/8/73	225.97

The extent of allowable witness fees and expenses is set forth in 28 U.S.C. §1821, which specifies that a witness is to be paid a per diem fee of $20 plus travel expenses of 10¢ per mile "regardless of the mode of travel employed by the witness." The statute makes no provision for reimbursement of expert witness fees, and actual expenses incurred in excess of this statutory amount are not recoverable as costs and should not be taxes against the losing party. Henkel v. Chicago, St. P., M. & O. Ty. Co., 284 U.S.

444 (1932); Cheatham Electric Switching Device Co. v. Transit Development Co., 261 F. 792, 796 (2d Cir. 1919); 6 Moore's Federal Practice, ¶54.77 [5.-3] p. 1734.

The witness fee to Dr. Barrett of $1,349.00 must therefore be disallowed, and the travel expenses of Dr. Derryck and Eric Lewis must be recomputed on the statutory basis of 10¢ per mile.

The expenses of Mr. Yeager to attend the post-trial conference of June 8, 1973 must similarly be disallowed. It has often been held that the travel expenses of attorneys to attend depositions are not properly taxable as costs. See e.g., City Bank of Honolulu v. Rivera Davila, 438 F.2d 1367, 1371 (1st. Cir. 1971); 6 Moore's Federal Practice, ¶54.77(8), p. 1751. The recovery of $225.97 travel expenses to attend a post-trial conference should a fortiori be denied where co-counsel was present in New York at that time, and where there is no showing that the District Court was advised of Mr. Yeager's absence from the State and that a request had been made to adjourn the conference to a later date.

The request for $66.88 as "other expenses" and $250.00 for "subway fares and Xerox costs" should also have

been denied on the grounds that a successful litigant is not entitled to reimbursement of all expenses incurred in conducting his case. Farmer v. Arabian American Oil Co., supra; City Bank of Honolulu v. Rivera Davila, supra.

The costs of transcripts were awarded to both the United States Attorney's Office and the Project. In effect, one defendant, the Union, is required to pay twice for the same item. It is submitted that the Union need pay at most for one copy of the transcript, the amount of which should be apportioned among the successful plaintiffs in proportion to their contribution to the outcome of law suit. Sperry Rand Corporation v. A-T-O, Inc., 58 F.R.D. 132 (E.D. Va. 1973).

Finally, the District Court should have recognized further the huge expense the Union has incurred and will incur in the processing and testing of new applicants and should have exercised its discretion in apportioning the costs to be taxes among all the parties. United States v. Lathers Local 46, 328 F.Supp. 429, 442-443 (S.D.N.Y. 1971).

CONCLUSION

For the reasons set forth herein, the Court should

reverse the District Court's Order which awarded attorneys' fees to the Project and against the Union and it should reverse the award of costs and disbursements.

It is respectfully urged that the Union's financial ability to implement the Affirmative Action Plan and to function as an effective collective bargaining agent is essential to the enforcement of Title VII rights.

Respectfully submitted,

DELSON & GORDON
Attorneys for Defendant-Appellant
Enterprise Association,
Steamfitters Local 638 of U.A.

Richard Brook,
Of Counsel

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DENNIS BLACK, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 880 THERIOT AVE. BRONX, N.Y.

That on the 2nd day of March, 1976, deponent personally served the within Brief for Defendant-Appellant, Enterprise Association Steamfitters Local 638 of U.A. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

MARILYN R. WALTER
National Employment Law Project
Attorneys for Defendant-Appellant, George Rios, Et Al
423 West 118th Street
New York, New York 10027

Dennis Black

Sworn to before me this

2nd day of March, 1976.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0933908
Qualified in Bronx County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH KENNEDY, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1171 Sterling Pl. Brooklyn, New York.

That on the 2nd day of March, 1976, deponent personally served the within Brief for Defendant-Appellant, Enterprise Association Steamfitters Local 638 of U.A. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

BREED, ABBOTT & MORGAN
Attorneys for Defendant-Appellee Mechanical Contractors Association of New York, Inc. and Defendant-Appellees Employer Members, Joint Steamfitting Apprenticeship Committee
1 Chase Manhattan Plaza
New York, New York 10005

Kenneth E. Kennedy

Sworn to before me this
2nd day of March, 19 76.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SCOTT ALVINO, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 5701 15 Ave. Brooklyn, New York.

That on the 2nd day of March, 1976, deponent personally served the within Brief for Defendant-Appellant, Enterprise Association Steamfitters Local 638 of U.A. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

TUFO, JOHNSTON & ALLEGAERT
Attorneys for Plaintiffs-Appellants George Rios, et al
645 Madison Avenue
New Yor, N. Y. 10022

Scott Alvino

Sworn to before me this
2nd day of March, 1976.

Michael DeSanto

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

VINCENT PANZA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 202 Ellis Avenue Bronx, N. Y.

That on the 2nd day of March, 1976, deponent personally served the within Brief for Defendant-Appellant, Enterprise Association Steamfitters Local 638 of U. A. upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

THOMAS J. CAHILL
United States Attorney
Attorney for Plaintiff-Appellant
Equal Employment Opportunity Commission
1 St. Andrews Plaza
New York, New York 10007

Vincent Panza

Sworn to before me this

2nd day of March, 1976.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977